UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RUSSELL KLIPPEL, on behalf of himself and all others similarly situated,

Plaintiff,

v.

PORTFOLIO RECOVERY ASSOCIATES, LLC

and

CATHERINE M. HEDGEMAN, ESQ.,

Defendants.

Case No. 15-cv-1061 (MAD) (TWD)

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

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Dated: March 24, 2017

INTRODUCTION

Plaintiff, Russell Klippel ("Klippel"), respectfully submits this memorandum of law in support of the unopposed motion for an Order (1) preliminarily approving the Settlement Agreement and Release of Claims executed by the parties on or about September 20, 2016 ("Settlement Agreement," filed contemporaneously with this memorandum) as fair, reasonable, adequate, and in the best interests of the Settlement Class; (2) certifying a settlement class (as defined in the Settlement Agreement and pending final approval by the Court); (3) approving the Notice and the Notice Plan as contained within the Settlement Agreement; (4) setting a date by which Notice must be sent; (5) appointing Russel Klippel as Class Plaintiff; (6) appointing attorneys Daniel A. Schlanger, Esq. (of Kakalec & Schlanger, LLP) and Anthony J. Pietrafesa, Esq. as Class Counsel; (7) scheduling a final approval hearing under Federal Rule of Civil Procedure 23(c)(2) (the "Final Fairness Hearing") after the Notice period has expired so that the Court can consider any objections to the settlement, approve the class settlement, and consider Class Counsel's applications for attorneys' fees and expenses and incentive awards directing notice to those eligible to opt-out of the class; and (7) dismissing, without prejudice, all claims as against the Individual Defendant, Catherine M. Hedgeman.

I. NATURE OF THE CASE

A. Facts Underlying this Class Action

Plaintiff alleges in his Complaint that Defendant Portfolio Recovery Associates, LLC ("PRA") and Defendant Catherine M. Hedgeman, Esq. violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1962, *et seq.*, by conveying false information regarding the basis for venue when Defendants filed state court collection actions against named plaintiff Russel Klippel and others similarly situated.

Specifically, Plaintiff alleges that in August 2014, PRA commenced an action against him in Johnstown City Court to enforce a debt even though Plaintiff is not subject to the jurisdiction of that court pursuant to UCCA § 213. (Compl. ¶¶ 14 –30). Plaintiff alleges that PRA stated that jurisdiction was proper because Plaintiff resided in Johnstown City, even though PRA allegedly knew (and correctly stated in its pleadings) that Mr. Klippel's residence was in the Village of Northville, Town of Northhampton. (Compl. ¶¶ 10, 17, 25, 30.)

Plaintiff alleges that Defendants "have a practice and pattern of suing consumer defendants in city courts without regard to whether such actions are properly filed there under UCCA ¶213". (Compl. ¶ 45.)

Plaintiff brought the action as a class action on behalf of himself and similarly situated individuals.

Plaintiff seeks to represent himself and all members of the following Settlement Class:

i. Natural persons;
ii. who were sued by PRA;
iii. in a state court consumer collection action;
iv. brought in the Northern District of New York;
v. in a city court in this District;
vi. in an action in which Hedgeman represented PRA;
vii. in which a summons misrepresented the state court's jurisdiction over the defendant by stating in the summons, in relevant part: "BASIS FOR VENUE: Defendant resides in jurisdiction of CITY OF__________ " [or any substantially similar statement];
viii. in which the address of the state court defendant's residence is listed in the summons and/or complaint, and is outside the jurisdiction of the relevant city court,
ix. and, in which the summons was filed within one year of the initiation of the instant class action.

(Settlement Agreement ¶ 20)

The Settlement further provides that

> *a.* With regard to determining, for purposes of subsection (viii) above, whether the residence "listed in the summons and/or complaint. . . is outside the jurisdiction of the relevant city court", the Parties agree that this means that the consumer is not "a resident of the city [in whose city court the collection action was filed] or of a town

> contiguous to such city, (i) within the same county, and (ii) contiguous to the city by land." *UCCA Sec. 213(a)(1).*
>
> b. With regard to determining, for purposes of subsection (vi) above, whether PRA was "represented by Ms. Hedgeman", the Parties agree that this will include only those cases where the summons and/or the complaint bears Catherine Hedgeman's signature or its likeness.

Id. at ¶ 20(a).

Pursuant to the Settlement Agreement, the Parties agreed upon a procedure pursuant to which PRA provided Plaintiff's counsel with all possibly relevant state court summonses and complaints, and Plaintiff then examined these documents and identified Class Members. See *id*. at Section IV ("Compilation Of The Class List"), ¶¶ 35-39.

After considerable back and forth, the parties are now in agreement on the identity of each and every Class Member. ECF Doc. 50 (Status Report On Behalf Of All Parties, dated February 17, 2017, notifying the Court of resolution of all outstanding class list disputes).

The Parties have agreed upon a proposed Notice of Proposed Class Action Settlement and Fairness Hearing.

B. The Fair Debt Collection Practices Act

The FDCPA was enacted to "eliminate abusive debt collection practices by debt collectors, [and] to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent state action to protect consumers." *Corazzini v. Litton Loan Servs. LLP*, 2011 U.S. Dist. LEXIS 63565, at *15 (N.D.N.Y. 2011) (D'Agostino, J.).

When evaluating an FDCPA claim, courts apply the objective "least sophisticated consumer" standard. *See Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993) (adopting the objective standard known as the "least sophisticated consumer" to ensure the FDCPA "protects all consumers, the gullible as well as the shrewd"); *see also Corazzini*, 2011 U.S. Dist. LEXIS 63565, at *16.

One such specific prohibition is found at 1692i, which – addressing the problem of consumers being sued in distant fora -- requires that "[a] debt collector who files suit [does] so either where the consumer resides or where the underlying contract was signed." See S. Rep. No. 95-382, at 5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699 (addressing the history of 1692i and the phenomenon of "forum abuse"). Complaint at ¶ 3.

The statute also bars, *inter alia*, "the false representation of. . . the character. . . or legal status of any debt" (§ 1692e(2)), as well as taking or threatening to "take any action that cannot legally be taken) (§ 1692e(5)), and "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt [.]" 1692e(10). Complaint at ¶ 4. When a plaintiff establishes a violation, he or she may recover statutory damages in an amount not to exceed $1,000, plus any actual damages sustained. *See* 15 U.S.C. §§ 1692k(a)(1), 1692k(a)(2)(A). Recovery in FDCPA class actions are limited to $1,000 statutory damages for each named plaintiff, and the lesser of $500,000 or one percent of the net worth of the defendant debt collector for the remainder of the class. *See* 15 U.S.C. §§ 1692k(a)(1), 1692k(a)(2)(B).

C. Terms of the Proposed Settlement

Pursuant to the terms of the Settlement Agreement, Defendant provided Plaintiff with agreed-upon materials (to wit, summonses and complaints from some 721 state court collection actions) from which Plaintiff compiled a list of 205 Class Members based on the settlement class criteria described Section I.A above. The Parties have agreed upon the list of Class Members compiled by Plaintiff's counsel.

Within 30 days following entry of an order preliminarily approving settlement and certifying the class, the Settlement provides that Heffler Claims Group (the "Settlement Administrator") shall mail a Notice attached as Exhibit B to the Proposed Preliminary Approval Order to all Class Members. The Settlement Administrator will also maintain a website containing settlement documents and other relevant information for review by Class Members. A Class Member who wishes to be excluded from the Settlement Class may make such a request by mailing the Settlement Administrator his/her full name and address and specifically stating a desire to be excluded.

Subject to this Court's approval, the monetary terms of the Settlement are as follows: the Settlement Administrator shall mail each Class Member a check for $250 unless that Class Member explicitly requests exclusion from the class. The only exception will be that the lead plaintiff, Russel Klippel, who will receive payment of $1,000 in statutory damages as well as $2,500 as a service fee to compensate him for his services and efforts on behalf of the class.

Separately, and again subject to the Court's approval, Defendant will pay $36,000 in attorneys' fees and costs pursuant to Paragraph 62 of the Settlement Agreement.

Defendant will also pay the costs reasonably incurred by the Settlement Administrator to provide necessary services, such as notice to Class Members, as provided for in the Settlement Agreement. Funds remaining with the Settlement Administrator more than 120 days after settlement payment checks are mailed (*i.e.*, money resulting from un-cashed settlement checks) will be paid to one or more providers of free legal services who shall be mutually agreed upon by the parties, subject to Court approval.

In consideration of the sums paid by Defendant pursuant to the Settlement Agreement, the Class Members will each forever release, discharge, waive, and covenant not to sue each of the two defendants named in the Complaint in this matter regarding any of the Released Claims, to wit, all claims that were raised or could have been raised in the instant action based on a common nucleus of operative facts other than FDCPA actual damage claims, provided however that the release shall not include any defense to any of the underlying state court actions and/or judgments.

II. ARGUMENT

A. The Court Should Certify a Conditional Class So that Class Members May Be Notified

Courts may certify a class for settlement purposes only. *Elliot v. Leatherstocking Corp.*, 2012 U.S. Dist. LEXIS 171443, at *4 (N.D.N.Y. Dec. 4, 2012); *McDaniel v. County of Schenectady*, 2007 U.S. Dist. LEXIS 81889, at *10-11 (N.D.N.Y. Nov. 5, 2007). Indeed, "[c]ertification of a class for settlement purposes only is permissible and appropriate." *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 31 (E.D.N.Y. 2006) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619-21 (1997)).

Rule 23(a) provides that: "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). In addition to satisfying Rule 23(a), a plaintiff must satisfy one of three criteria set forth in Rule 23(b). *See Comer v. Cisneros*, 37 F.3d 775, 796 (2d Cir. 1994).

Here, Plaintiff seeks certification under Rule 23(b)(3) which provides that certification is appropriate when "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

1. *Rule 23(a) Requirements*

i. The Numerosity Requirement Has Been Met

A plaintiff is not obligated to identify the exact number of class plaintiffs. *See Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993). However, the Second Circuit has previously determined that numerosity is presumed at a figure of 40. *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Here, there are 205 Class Members.

ii. There are Common Questions of Fact of Law

Commonality is satisfied "if plaintiffs' grievances share a common question of law or fact." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997). Put another way, what is needed is a common nucleus of operative facts or an issue that affects all members of the class. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 166-67 (2d. Cir. 1987). There need only be a single issue common to all members of the class.

Here, the central issue in the case is the allegation that Defendant made false statements in summonses as to each Class Member's place of residence in connection with obtaining allegedly improper venue over them in a debt collection action, in violation of the FDCPA. This common issue is sufficient to satisfy this requirement.

iii. The Plaintiff's Claim is Typical of Those of the Members of the Class

Typicality is satisfied when "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993). "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying the individual claims." *Id.*

In this case, all the Class Members' claims arose out of identical or substantially similar allegedly deceptive language pertaining to venue and jurisdiction in summonses issued in debt collection actions commenced against them, resulting in the same violations of the FDCPA being implicated for each class member. Thus, the settlement Class Members' claims are typical of one another.

iv. Plaintiff and His Counsel Offer the Class Adequacy of Representation

To satisfy this factor, a plaintiff must demonstrate two elements: (1) "there is no conflict of interest between the named plaintiffs and other members of the plaintiff class" and (2) "class counsel is qualified, experienced, and generally able to conduct the litigation." *Marisol. A. v. Giuliani*, 126 F.3d 372, 378 (2d. Cir. 1997) (internal citations and quotations omitted); *see also In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29 (2d Cir. 2009) (conceptualizing first prong as whether "plaintiff's interests are antagonistic to the interest of other members of the class").

In this matter, there is no antagonism between Plaintiff's claims and those of the proposed class that would interfere with Plaintiff's ability to act as class representative. The proposed class members all received summonses evincing identical or substantially similar deceptive statements concerning venue and jurisdiction. There are no subclasses and the Plaintiff is well-situated to represented every Class Member.

Further, Plaintiff's counsel, Daniel A. Schlanger of Kakalec & Schlanger, LLP and Anthony J. Pietrafesa are each qualified and experienced attorneys, fully familiar with consumer litigation, with the FDCPA and with class action work. *See* Declaration of Daniel A. Schlanger in Support of Motion for Preliminary Approval of Class Settlement dated March 24, 2017

("Schlanger Decl."). Mr. Pietrafesa and Mr. Schlanger have each submitted declarations setting forth their respective credentials. These attorneys will adequately represent the class.

2. *Rule 23(b): Superiority*

To determine whether a class settlement satisfies Rule 23(b)(3)'s requirement that it be the superior and appropriate method for the fair and efficient resolution of this matter, the Second Circuit instructs a two-step inquiry looking first to whether the issues affecting the class predominate in the lawsuit and next to whether the class action is a superior mechanism. "In order to meet the predominance requirement of rule 23(b)(3), a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole . . . predominate over those issues that are subject only to individualized proof." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001); *see also Moore v. Paine Webber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002) (finding predominance met "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof"). If predominance is found, a Court must also determine whether "a class action is superior to other available methods for . . . adjudicating a controversy." Fed. R. Civ. P. 23(b)(3).

This case involves allegedly misleading statements contained in form summonses submitted in state court proceedings. These statements are identical or substantially similar as to each Class Member in that each summons allegedly misstates the location where the Class Member resides. This action does not involve any matters beyond the alleged misrepresentations in the summonses as to the residence of the person upon whom the summons was to be served. As such, the common issues in the instant case predominate over any issues that would be subject to individualized proof. Likewise, a class action here appears to be the superior method for the "fair and efficient adjudication" of a suit potentially involving several hundred individuals with identical or virtually identical claims.

Accordingly, the Court should provisionally certify the class herein.

B. The Settlement Agreement Should Be Preliminarily Approved

"Preliminary approval . . . is the first step in the settlement process. It simply allows review of the proposed settlement within a range of reasonableness and notice to issue to all members of the class . . . to object or to opt-out of the settlement." *Marroquin Alas v. Champlain Valley Specialty of N.Y., Inc.*, No. 5:15-cv-00441, Dkt. No. 39 at 3 (N.D.N.Y. Feb. 8, 2016) (D'Agostino, J.). "To grant preliminary approval, the court need only find that there is probable cause to submit the settlement to class members and hold a full-scale hearing as to its fairness." *Torres v. Gristede's Operating Corp.*, 2010 U.S. Dist. LEXIS 75362, at *11 (S.D.N.Y., June 1, 2010).

The court should be guided by the Second Circuit's recognition that public policy favors the settlement of class actions. See *Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 328 (S.D.N.Y. 2005) ("There is a strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy.") (internal citations omitted), *aff'd in part and vacated in part*, 443 F.3d 253 (2d Cir. 2005). As this Court has recognized, "[t]here is a strong judicial policy in favor of settlements, particularly in the class action context." *Marroquin Alas v. Champlain Valley Specialty of N.Y., Inc.*, 2016 U.S. DIST. Lexis 79043, at *9 (N.D.N.Y. June 17, 2016) (D'Agostino, J.). "Moreover, a presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Id.*

A brief examination of the proposed settlement, using the factors laid out by the Second Circuit for evaluating the substantive fairness of a class action settlement in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), demonstrates that this settlement should be given the Court's preliminary approval. "Judges should not substitute their own judgments as to optimal settlement terms for the judgment of the litigants and their counsel." *Gautreaux v. Pierce*, 690 F.2d 616, 631 (7th Cir. 1982).

1. The complexity, expense and likely duration of the litigation

In this case, the Defendant has denied liability. Were the case to proceed, Defendants would argue that the misrepresentations in the summonses were immaterial as a matter of law, and would also raise a *bona fide* error defense. While the FDCPA is a strict liability statute, and the plaintiffs believe that the misrepresentations complained of are false and misleading and clear violations of the law, a trial may be necessary to resolve the merits.

The Defendant has not agreed to class certification except for purposes of settlement, so motion practice would be necessary on the issue of class certification, which Defendants have indicated they would aggressively challenge.

Indeed, even assuming Plaintiff were to prevail on the merits it is entirely possible that they would obtain lower recovery than agreed to in the Settlement Agreement. Defendant could engage in an appeal, further delaying any relief to the Class Members for many additional months or years. Settlement will yield a quick payment and insured benefit to each member of the class.

2. The stage of the proceedings and the amount of discovery completed

Although the case has not proceeded through formal discovery, as part of the settlement process, Defendant provided Plaintiff with the core discovery materials that would have been produced over the course of the litigation – including summonses and complaints in some 721 state court collection actions brought by Defendants in state courts in the Northern District – and Plaintiff's counsel reviewed those materials to identify Class Members.

Having reviewed the discovery materials provided pursuant to the Settlement Agreement, Plaintiff's counsel have assured themselves that they have enough information to assess the fairness of the proposed settlement. Settling at this stage will obviate the need for expensive and lengthy formal discovery, including heated motion practice regarding certain additional classes of documents that would be relevant if the matter proceeded.

Moreover, the Settlement is the result of exhaustive negotiations between the parties over the course of the past six months. The parties met with a mediator on March 17, 2016 and thereafter negotiated the terms of the Settlement Agreement for several months. There can thus be no question but that the proposed settlement is the result of *bona fide,* arm's length negotiations. *See McReynolds v. Richards-Cantave*, 588 F.3d 790, 803-804 (2d Cir. 2009); *People United for Children, Inc. v. City of New York*, 2007 U.S. Dist. LEXIS 15425, at *8-9 (S.D.N.Y. Feb. 23, 2007).

3. The risks of establishing liability and the risks of establishing damages

While recovery in FDCPA class actions are limited to $1,000 statutory damages for each named plaintiff, *see* 15 U.S.C. §§ 1692k(a)(2)(B), courts in this district have routinely awarded substantially lower figures per plaintiff, *see, e.g.*, *In re Scrimpsher*, 17 B.R. 999 (Bankr. N.D.N.Y. 1982) (awarding $300 per plaintiff); *see also Mostiller v. Chase Asset Recovery Corp.*, No. 09-CV-218A, 2010 U.S. Dist. LEXIS 5208, at *10 (W.D.N.Y. Jan. 22, 2010) (awarding $250 per plaintiff). Courts have routinely reserved a full $1,000 award of statutory damages for violations that are "particularly egregious and intimidating." *Todes v. Takhar Grp. Collection Servs.*, No. 13-CV-444C, 2016 U.S. Dist. LEXIS 40460, at *4 (W.D.N.Y. Mar. 24, 2016); *Overcash v. United Abstract Grp., Inc.*, 549 F. Supp. 2d 193, 196 (N.D.N.Y. 2008) (awarding $1,000 per plaintiff in light of "relatively egregious" conduct).

The proposed settlement signifies a significant accomplishment inasmuch as the $250 payment in settlement for each Class Member assures them each a substantial, fixed sum in consideration for the releases provided to the defendants as part of the Settlement Agreement. Moreover, in light of the precedents within this District, the sum obtained for each Class Member may well be larger than what they would have obtained if they were to prevail at trial on a class or individual basis.

Further, Class Members' release is narrowly crafted, preserving claims not stemming from the same common core of operative facts, as well as FDCPA claims for actual damages, and all state court defenses in pending actions and to state court judgments.

4. The risks of maintaining the class action through the trial

As described above, Plaintiff has not yet moved for class certification. Settlement removes any risk that class certification would be denied or that, if granted, such decision could be appealed. Additionally, should the case proceed to trial, Defendants will argue that the class should not include individuals upon whom summonses and/or complaints were not properly served, thus rendering a significant minority of the Class Members at risk of exclusion from any recovery.

5. The ability of the Defendant to withstand a greater judgment; the range of reasonableness of the settlement fund in light of the best possible recovery, and the *range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation*

The settlement herein obtains for each class member an assured, and appreciable, recovery. Based on the terms of the Settlement Agreement, each class member is assured a fixed sum of $250 which cannot be diluted regardless of the size the class or the amount of fees awarded. As discussed above, this amount may not only exceed what the class would have recovered at trial, but also what any individual litigant might have recovered had he or she pursued the case on an individual basis, even assuming the consumer prevailed.

6. The Attorney's Fees Provisions of the Settlement Are Reasonable

"Courts have encouraged litigants to resolve fee issues by agreement." *Foti v. NCO Fin. Sys.*, 2008 U.S. Dist. LEXIS 16511, at *21 (S.D.N.Y. Feb. 19, 2008). "This is particularly so" if, as in the instant case, "the amount of attorneys' fees is in addition to and separate from defendant's settlement with the class." *Id.* at *21.

Pursuant to the Settlement Agreement, and subject to Court approval, Defendant will pay $36,000 in attorney's fees separate and apart from the recovery to the class. Specifically, as set forth in the Settlement Agreement at Paragraph 62, Defendant shall make such payment to Plaintiff's counsel within 10 days of the Effective Date of Settlement (as defined therein). This fee is well-supported by the extensive efforts expended by Plaintiff's counsel. As detailed in the accompanying declarations, Plaintiffs' counsel have spent approximately 206 hours representing the class to date, including approximately 156 hours of attorney time. (*See* Schlanger Decl. ¶¶ 30-33).

Furthermore, prior to the Court's issuance of Final Judgment approving the proposed Settlement Agreement, Plaintiff's counsel will submit their detailed, contemporaneous time records to the Court.

It is well-established that "a prevailing plaintiff is entitled to the costs of her FDCPA action, as well as a reasonable attorney's fee." *Overcash v. United Abstract Grp., Inc.*, 549 F. Supp. 2d 193, 197 (N.D.N.Y. 2008). A reasonable fee is calculated by taking "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart et al.*, 461 U.S. 424, 433 (1983). This is often referred to as the "lodestar method" and is the method that has "achieved dominance in the federal courts." *Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002). "The reasonable hourly rate is the rate a paying client would be willing to pay." *Arbor Hill*, 522 F.3d at 190. Courts are also to consider that a reasonable client wishes to "spend the minimum necessary to litigate the case effectively." *Id.*

As specified in Plaintiff's counsel's declarations, Plaintiff's counsel, including support staff, have dedicated approximately 256 hours to representing the interests of the class to date. (Schlanger Decl. ¶¶ 38-39) The lodestar for Plaintiff's counsel at Northern District rates is over $74,422.00 *Id*. *Pope v. Cnty. of Albany*, No. 1:11-cv-0736 (LEK/CFH), 2015 U.S. Dist. LEXIS 123379, at *26-27 (N.D.N.Y. Sep. 16, 2015); *Bosket v. NCO Fin. Sys., Inc.*, No. 11-CV-00678, 2012 U.S. Dist. LEXIS 132239, at *4 (N.D.N.Y. Sept. 17, 2012).

Thus, the fees agreed upon in the Settlement Agreement of $36,000 are well below the amounts yielded by the lodestar method and eminently reasonable.

In addition to the lodestar, factors to consider in determining the appropriateness of Class Counsel's fees and costs may include:

> (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Foti, 2008 U.S. Dist. LEXIS 16511, at *18-19 (applying factors to FDCPA class settlement obtaining solely injunctive relief and affirming award of $137,000 in attorney's fees, *inter alia*, because it was consistent with a fair lodestar); *see also Marroquin Alas*, 2016 U.S. Dist. LEXIS 79043, at *21.

As to the first factor – time and labor expended – Plaintiff's counsel's time has been considerable. In addition to identifying, investigating and pursuing the claims, and negotiating settlement, Plaintiff's counsel has, as part of the process of identifying Class Members, expended significant time obtaining and reviewing all of what would have been the core class member discovery had the action proceeded. Indeed, even prior to issuance of Notice, the Fairness Hearing and the work that will be required post-Final Judgment, Plaintiff's counsel has provided services worth significantly more per the lodestar method than the amount agreed upon for fees.

As to the second factor – magnitude and complexity of the litigation – this case involves novel issues concerning the interplay between New York state procedural law and the FDCPA, which Plaintiff's counsel has developed and pursued. It also included complex and time-consuming negotiations over the scope of the class. Plaintiff's counsel has obtained a substantial, fixed settlement for each Class Member, evincing a high quality of representation. Plaintiff's counsel are experienced consumer rights attorneys who have committed considerable resources to this action to vindicate the rights of the Class Members.

As to the third and fourth factors – the risks of litigation and the quality of representation – this action faced risk in terms of the *bona fide* error exception to FDCPA liability and materiality. The size of the class was also the subject of extensive negotiations and faced a risk of being narrowed if the issue were to continue to be litigated.

Public policy considerations further favor the requested award of attorneys' fees and costs as "the relatively low value of the putative Class Members' individual claims would have made their litigation on an individual basis cost prohibitive" and the FDCPA provides fees to incentivize qualified counsel to pursue its remedial purpose. *Id.* at 26.

Further, this "class settlement is not a monetary common fund, and the attorneys' fees will not come out of the pocket of the class members." *Foti v. NCO Fin. Sys.*, 2008 U.S. Dist. LEXIS 16511, at *21. To the contrary, "were the Court to reduce the agreed-upon amount of attorneys' fees, the only beneficiary would be [the defendant] – not the class." *Id.* Indeed, in this case Class Counsel's fees were not even *addressed* in settlement negotiations until *after* the Class Members' recovery and Plaintiff's service fee were fully agreed upon. (Schlanger Decl. ¶ 46).

In short, the factors listed above all provide strong support for the preliminary approval of the settlement, including both the relief to the class and the attorney's fees provisions.

III. THE PROPOSED NOTICE TO THE CLASS SHOULD BE APPROVED

Once preliminary approval is bestowed, the second step of the process ensues; notice is given to the class members of a hearing, at which time class members and the settling parties may be heard with respect to final court approval. *Am. Med. Ass'n v. United Healthcare Corp.*, 2009 U.S. Dist. LEXIS 45610, 2009 WL 1437819, at *3 (S.D.N.Y. May 19, 2009). Pursuant to Rule 23(c)(2)(B), when a class is certified under Rule 23(b)(3), the Court must direct to the class members "the best notice practicable under the circumstances, including individual notice to all members, who can be identified through reasonable effort." With regard to class certification pursuant to a settlement, the notice "must fairly apprise the prospective members of the class of the pendency of the class action, the terms of the proposed settlement, and the options that are open to them in connection with the proceedings, including the option to withdraw from the settlement." *Reade-Alvarez*, 237 F.R.D. at 34 (citing *Weinberger v. Kendrick*, 698 F.2d 61, 70-71 (2d Cir. 1982)).

The proposed notice meets the requirements set forth under Rule 23(c)(2)(B). (*See* Settlement Agreement, Exhibit C, at 1) The proposed notice here contains all the necessary information, including the nature of the lawsuit, the class, the settlement terms, and the options available to the members of the class. *Id.* Upon approval by the Court, the Class Administrator will mail, by first class mail, the Class Notice to each class member at his/her last known address. Settlement Agreement, at ¶ 40.

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CONCLUSION

For the reasons set forth above, Plaintiff's unopposed motion to certify the settlement class and for preliminary approval of the class settlement should be granted and the Court should set the various dates and deadlines for notice, opt-outs, exclusions, objections, and a hearing under Rule 23.

Dated: March 24, 2017
New York, New York

Respectfully Submitted,

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